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IN THE

Supreme Court of the United States

October Term, 1961

No. 505

A. L. WIRIN,

Petitioner,

vs.

HAROLD J. OSTLY, as County Clerk of the County of Los Angeles, State of California,

Respondent.

On Petition For Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division Two

BRIEF FOR THE RESPONDENT IN OPPOSITION

HAROLD W. KENNEDY
County Counsel
and
RONALD L. SCHNEIDER
Deputy County Counsel
By HAROLD W. KENNEDY
County Counsel
648 Hall of Administration
Los Angeles 12, California
Attorneys for Respondent

WESTERN PRINTING COMPANY, WHITTIER, OXBOW 8-1733

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Opinion Below

The opinion of the District Court of Appeal is reported in 191 Adv. Cal. App. 746, 13 Cal. Rptr. 31 (Pet. for Writ, Appx. "A").

Question Presented

Whether the State of California can require, as a condition of holding a government office such as that of a notary public, the taking of the oath prescribed in Article XX, Section 3, of the Constitution of the State of California.

Constitutional Provisions and Statutes Involved

In addition to the Federal and State Constitutional provisions set forth in the Petition for Writ (Pet. for Writ, pp. 3-5) certain provisions of the Government Code of the State of California, relating to the office of notary public, are also applicable and are here set forth in relevant part.

Section 8200 provides:

> "Section 8200. Appointment and commission: number; jurisdiction; fees.
>
> The Governor may appoint and commission notaries public in such number as he deems necessary for the public convenience. Notaries public may act as such notaries in any part of this State, and they shall receive for their services such fees as are provided by law."

Section 8201 provides:

> "Section 8201. Qualifications.
>
> Every person appointed as notary public shall:
>
> (a) Be at the time of appointment a citizen of the United States and of this State, except as otherwise provided in Section 8203.1 of this chapter.
>
> (b) Have resided in this State for 12 consecutive months immediately preceding his appointment, except as otherwise provided in Section 8203.1.
>
> (c) Be not less than 21 years of age.
>
> (d) Be of good moral character."

Section 8205 provides:

"Section 8205. Duties.

It is the duty of a notary public:

(a) When requested, to demand acceptance and payment of foreign and inland bills of exchange, or promissory notes, to protest them for nonacceptance and nonpayment, and to exercise such other powers and duties as by the law of nations and according to commercial usages, or by the laws of any other state, government, or country, may be performed by notaries.

(b) To take the acknowledgment or proof of powers of attorney, mortgages, deeds, grants, transfers, and other instruments of writing executed by any person, and to give a certificate of such proof or acknowledgment, endorsed on or attached to the instrument. Such certificate shall be signed by him in his own handwriting and under his signature his name shall be typed or legibly printed.

(c) To take depositions and affidavits, and administer oaths and affirmations, in all matters incident to the duties of the office, or to be used before any court, judge, officer, or board in this State. Any deposition, affidavit, oath or affirmation shall be signed by him in his own handwriting and under his signature his name shall be typed or legibly printed."

Section 8206 provides:

"Section 8206. Records; certified copies.

A notary public shall keep a record of all official acts done by him and a record of the parties to, date, and character of every instrument acknowledged or proved before him.

When requested, and upon payment of the fee therefor, a notary public shall make and give a certified copy of any record in his office."

Section 8212 in relevant part provides:

"Section 8212. Bond, amount, approval.

Every person appointed a notary public shall execute an official bond in the sum of five thousand dollars ($5,000). . . ."

Section 8213 provides:

"Section 8213. Bond, filing, recording, fee; oath, filing; disposition of bond; record as evidence.

Within 20 days from the beginning of the term prescribed in his commission, every person appointed a notary public shall file his official bond, and take, subscribe, and file his oath of office in the office of the county clerk of the county within which he maintains his principal place of business. Upon filing the oath and bond, the county clerk shall forthwith transmit to the Secretary of State his certificate setting forth the fact of such filing and containing a copy of the official oath, signed by the notary with his own proper signature, and shall forthwith deliver the bond to the county recorder for recording.

If he transfers his principal place of business from one county to another he shall, within 20 days of such transfer, file a new oath of office and bond, or a duplicate of the original bond, with the county clerk of the county to which he transfers.

A recording fee of two dollars ($2) shall be paid by the person appointed a notary public. Said fee may be paid to the county clerk who shall transmit it to the county recorder.

The county recorder shall record the bond and return it to the county clerk who shall keep the bond for one year following the expiration of the term of the commission for which the bond was issued after which said bond may be disposed of. Such disposition shall not affect the time for commencement of actions on the bond. A certified copy of the record of the official bond with all affidavits, acknowledgments, endorsements and attachments, may be read in evidence with like effect as the original thereof, without further proof."

Section 8214 provides:

"Section 8214. Misconduct or neglect.

For the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the persons injured thereby for all the damages sustained."

STATEMENT OF THE CASE

Petitioner, after applying for and receiving an appointment and commission as a notary public (C.T. 32-33), thereafter presented his notary bond and fee to respondent as required by law. (C.T. 33). Section 8213 of the Government Code of California provides, in part, that every person appointed a notary public shall file his official bond, and take, subscribe, and file his oath of office in the office of the county clerk. That section further provides, in part, that upon filing of the oath and bond, the county clerk shall forthwith transmit to the Secretary of State his certificate setting forth the fact of such filing and containing a copy of the official oath, signed by the notary with his own proper signature and shall forthwith deliver the bond to the county recorder for recording.

At the time he presented his bond and fee to respondent, petitioner refused to subscribe in toto to the oath of office as required by Article XX, Section 3 of the State Constitution. (C.T. 33).

Petitioner was willing to subscribe to the first portion of the oath which reads as follows:

> "I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take

this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter." (C.T. 34-35)

However, petitioner refused to subscribe to the remaining portion of the oath:

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

.....

(If no affiliations, write in the words "No Exceptions") and that during such time as I hold the office of .....

(name of office)

I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means." (C.T. 33-34)

Respondent refused to administer the modified oath to petitioner (C.T. 35) who thereupon filed the present action for a declaration of his rights.

At the trial, petitioner testified that his refusal to take the excised portions of the oath of office was grounded on his membership and belief in the principles espoused by a local church (R.T. 3-5), his personal conscience and belief (R.T. 5) and his personal opinion as an attorney that the State had no legal right to require the taking of the oath. (R.T. 11-12).

However, he did answer questions directed to him by the trial court which encompassed these selfsame questions he had heretofore refused to answer. (R.T. 12-15).

The trial court refused to attach credibility to petitioner's professed contentions that his personal conscience, religious belief or membership in a local church prevented him from taking the completed oath of office. (R.T. 82, C.T. 35). The trial court further determined that the oath of office is not a religious test, nor does it compel a disavowal of political belief or opinion or of membership in any named political party. (R.T. 82-83, C.T. 36).

The District Court of Appeal in an unanimous decision affirmed the trial court, holding that the case of *Pockman v. Leonard*, 39 Cal. 2d 676, (app. dism. for want of a substantial federal question, 345 U.S. 962), had already upheld the constitutionality of this particu-

lar oath and had already determined that this oath of office was not a religious or political test. (Pet. for Writ, Appx. "A," pp. 4-5).

The Supreme Court of California denied a petition for hearing on June 21, 1961. (R.).

I.

THE DECISION OF THE CALIFORNIA COURT IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Petitioner would have this Court accept this case because it falls somewhere in between *Speiser v. Randall*, 357 U.S. 513 and *Konigsberg v. State Bar*, 366 U.S. 36. (Pet. for Writ, Point I).

Respondent contends that far from lying between these two cases, it comes within the ambit of neither. No amount of dialectics can obscure the central fact of this case that the non-political oath of office required of potential state officers by the State of California does not operate to shift the ultimate burden of persuasion of non-advocacy of violent overthrow of government. To the contrary, the oath of office merely serves to establish a prima facie case of such non-advocacy.

In *Speiser*, supra, 357 U.S. 513, this Court struck down a State statute that required that an applicant for a tax exemption execute a statement denying advocacy of unlawful overthrow of the government.

This Court held that the taking of the oath was only the first of several distinct steps in the probative process throughout which the taxpayer had to bear the laboring oar in showing his qualification for a tax exemption. Because the continuing affirmative burden of proof—in effect the ultimate burden—was placed on the taxpayer, the requirement of the taking of the first step, the filing of the oath, was held to be violative of due process.

In *Konigsberg*, supra, 366 U.S. 36, this Court upheld a requirement of the State Bar of California that applicants for the bar answer questions relating to Communist Party membership. This Court pointed out that while an applicant had to establish a prima facie case of non-advocacy[1], there was no indication that the applicant had the ultimate burden of persuasion on that issue.

As pointed out by the Court below, the oath of office required of petitioner is neither a religious nor political test. (Pet. for Writ, Appx. "A," p. 5). This would seem to dispose of petitioner's suggestion as to the applicability of the *Speiser* rationale to this case since this Court has explicitly limited that case to situations where there is a showing of an intent to penalize political beliefs. (*Speiser v. Randall*, supra, 357 U.S. 513 at 527; *Konigsberg v. State Bar*, supra, 366 U.S. 36 at

[1]It is to be noted here that no attack is made by petitioner on the requirement of Section 8201(d) of the Government Code of California that potential notaries public have the burden of establishing a prima facie case of "good moral character." Compare this requirement with the similar burden of proof required of State Bar applicants. (*Konigsberg v. State Bar*, 366 U.S. 1[illegible]

54). There is not a scintilla of evidence in the record here that the oath of office was used by the State as a device to probe into petitioner's political beliefs. In point of fact, the California courts have already held this oath to be non-political in character. (cf. *Pockman v. Leonard*, 39 Cal. 2d 676 at 686).

Konigsberg is likewise inapplicable here since the oath of office does not place upon petitioner the ultimate burden of persuasion on the issue of non-advocacy of violent overthrow. All that the State requires of petitioner as an applicant for State office is the establishment of a prima facie case that he does not advocate unlawful overthrow of the government he seeks to represent.[2] Once this prima facie case is established, no further or ultimate burden of persuasion is required of petitioner. Respondent, who has the duty of administering the oath of office may not thereafter reject the completed oath and subject petitioner to further examination. The oath, in itself, is conclusive of the facts attested to so far as the right to office is concerned.[3]

As this Court points out in *Konigsberg*, requiring a defendant to testify in a civil proceeding or submit

[2]The validity of the interest of the State that potential officeholders disavow advocacy of violent overthrow of the government is shown in part by the fact that such advocacy is a disqualification for the holding of public office. See: Article XX, Section 19 of the Constitution of the State of California.

[3]Compare this with the situation facing the applicant for a tax exemption in *Speiser v. Randall*, 357 U.S. 513, who even if he completed the non-advocacy statement was still subject to further inquiry by additional judicial and administrative proceedings since the statement did not have an independent significance of its own.

to discovery has never been thought to shift the burden of proof to him. (*Konigsberg v. State Bar*, supra, 366 U.S. 36 at 55). So here, the mere fact that petitioner is required to make out a prima facie case of qualification for the office of notary public is beside the point. The point is that the filing of the oath itself is the final step in the process by which the State seeks to determine the fitness of applicants for State office.[4]

Therefore, it is apparent that neither *Speiser* nor *Konigsberg* are applicable here since the oath in question is non-political and places merely a prima facie, as opposed to an ultimate, burden of proof on the issue of non-advocacy on petitioner.

II.

THE STATE OF CALIFORNIA HAS THE RIGHT TO REQUIRE THAT ALL POTENTIAL STATE OFFICIALS DISAVOW UNLAWFUL OVERTHROW OF THE GOVERNMENT AS A CONDITION TO ENTERING THAT GOVERNMENT.

It is clear that the State has the right to ask the type of questions posed by the Constitutional oath of office. (cf. *Garner v. Board of Public Works*, 341 U.S. 716; *Gerende v. Board of Supervisors*, 341 U.S. 56; *Adler v. Board of Education*, 342 U.S. 485; and *American Communications Assn. v. Douds*, 339 U.S. 382).

[4]The initial steps are of course the establishment of a prima facie case of meeting the statutory qualifications for office, including that of good moral character, and the filing of a bond. (Sections 8201 et seq. of the Government Code)

Indeed, it is difficult to argue that a belief firm enough to become advocacy in the use of unlawful means of overthrow of government is an unimportant consideration in determining the fitness of those who seek public office. Yet, petitioner appears to be making that argument. He would limit the ambit of permissible inquiry to those officials who in some unknown manner are determined to be important rather than "minor." (Pet. for Writ, p. 15).

Respondent contends that this limitation is impractical and unrealistic. The Court below indicated that they were unable to draw a line so as to place some State officers within and others without the constitutional oath requirement. (Pet. for Writ, Appx. "A," p. 4). This Court should not now attempt to do so. In *Lerner v. Casey*, 357 U.S. 468, this Court upheld the right of the State to inquire into the background of a subway conductor. Certainly a notary public as an officer of the State with substantial powers in the commercial and legal fields, stands higher in the hierarchy of government than does a subway conductor. If a subway conductor can be required to answer questions regarding subversive advocacy, it would seem that, a fortori, petitioner as a potential state officer can be so required.

CONCLUSION

It is submitted that petitioner was properly required to take the complete oath of office required by Article XX, Section 3 of the Constitution of the State of California as a condition of his becoming a notary public. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

HAROLD W. KENNEDY,
County Counsel
and

RONALD L. SCHNEIDER,
Deputy County Counsel

By HAROLD W. KENNEDY,
County Counsel
648 Hall of Administration
Los Angeles 12, California
Attorneys for Respondent.